

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
APPENDIX**

~~73-2363~~

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X
UNITED STATES OF AMERICA,

Appellee,

-against-

RUBEN FELICIANO,

Appellant.
-----X

74-1846
Docket No. ~~73-2363~~

=====

APPENDIX TO APPELLANT'S BRIEF

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ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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Of Counsel



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JUDGE WARD 7 3 CRIM. 4 44

TITLE OF CASE

ATTORNEYS

Nicholas Figueroa, AUSA

vs.

2) BENIGNO RAMIREZ

For Defendant:

COSTS

DATE _____

NAME OR
RECEIPT NO.

REC.

DISB.

Clerk

Marshal

Docket fee

Sec. 201(b)(f) and 2
Bribery of Govt.
Official.

TWO COUNTS.

DATE _____

PROCEEDINGS

5-11-73

Filed Indictment - E/k: ordered.

-- Ryan, J.

5-29-73

Deft. present with Attorney. Court directs entry of not guilty plea. R.O.R.
10 days for motions. (Deft. FELICIANO)

RAMIREZ- Deft. (Atty. present) pleads not guilty. R.O.P. - 10 days for motions.
case assigned to Judge Ward. -- Cannella, J.

7-3-73

Filed Governments notice of readiness for trial.

7-19-73

BENIGNO RAMIREZ-Filed affdvt & notice of motion for a Bill of Particulars. Ret.
7-24-73.

9-5-73

Filed Gov't Bill of Particulars.

2-5-73

Filed Gov't affdvt in response to def't's Ramirez motion for a bill of particulars.

10-3-73

Filed MEMO ENDORSED. Motion denied except as consented to by the gov't. Ward, J.
 (Re: Motion for Bill of Particulars, filed 7-19-73)

DATE	PROCEEDINGS
11-28-73	RUBEN FELICIANO - Filed Waiver of Speedy Trial.
11-28-73	BENIGNO RAMIREZ - Filed Waiver of Speedy Trial.
1-17-74	RUBEN FELICIANO - Filed Affidavit of Larry S. Greenberg, on behalf of Deft, to determine his competence to understand the proceedings herein and to assist in his own defense and to request an adjournment of the trial scheduled for Monday, January 21, 1974.
1-21-74	BENIGNO RAMIREZ = Deft (interpreter Maria Elena Cardenas) with Atty Frank Ortiz present with draws plea of NOT GUILTY and pleas GUILTY to Ct.1. P.S.I. ordered. Sentence date 3-5-74 at 9:45 AM. R.O.R. -- WARD, J.
1-24-74	RUBEN FELICIANO = Deft, with Atty Larry Greenberg present. Jury Trial begins.
1-22-74	" " " " = Trial continues.
1-23-74	" " " " = Trial concluded. Jury deliberating. P.S.I. ordered. Verdict - Guilty as charged. Sentence date 3-5-74. R.O.R. Inform U.S. Atty's office if leaving area. -- WARD, J.
3-5-74	BENIGNO RAMIREZ = Filed Judgment and Order of Probation. /Judgment # 74,249 It is Adjudged the imposition of prison sentence on Count 1 is suspended. Deft is fined \$3,000.00 and placed on probation for a period of TWO (2) YEARS, subject to the standing probation order of this court. SPECIAL condition of probation being that the Deft pay the fine of \$3,000.00 within THIRTY (30) DAYS. Count 2 is dismissed on motion of Deft's counsel with the consent of the Government. -- WARD, J.
3-5-74	RUBEN FELICIANO = Filed Commitment. It is Adjudged that the Deft is hereby committed to the custody of the Atty General for imprisonment on Count 1 pursuant to Sec. 4208(b) of Title 18, U.S. Code, for study, report and recommendation as described in Sec. 4208(c). This commitment deemed to be for the maximum sentence prescribed by law, to wit: FIFTEEN (15) YEARS, unless altered by this Court pursuant to said section upon receipt of the report and recommendations. On count 2 pursuant to Sec. 4208(b) of Title 18, U.S. Code, for study, report and recommendations as described in Sec. 4208(c). This commitment deemed to be for the maximum sentence prescribed by law, to wit: TWO (2) YEARS, unless altered by this Court to said section upon the receipt of the report and recommendations. Sentence on Count 2 to run concurrently with sentence on Ct.1. The results of the Study, together with any recommendations which the Director of the Bureau of Prisons believes would be helpful in determining the disposition of the case shall be furnished to the Court within THREE (3) MONTHS. Deft. is continued on his recognizance until 10:30 A.M. on Monday, March 11, 1974, at which time the Deft is to surrender to the U.S. Marshal for service of sentence. -- WARD, J.
3-18-74	BENIGNO RAMIREZ - Fine marked satisfied and entered in money judgment book.
3-22-74	<i>Refined Sentence</i> - Filed commitment & entered return, Deft. delivered to <i>Warden</i> . <i>See House Bill 1010 3-11-74</i>
5-31-74	RUBEN FELICIANO = Filed Deft's Notice of Motion to proceed under Title 28 Section 2255 Forma Pauperis.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x
UNITED STATES OF AMERICA :

-v- :

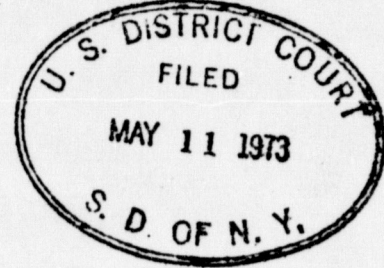
RUBEN FELICIANO and :
BENIGNO RAMIREZ, :

Defendants. :
-----x

73 CRIM. 444

INDICTMENT

73 Cr.



The Grand Jury charges:

On or about the 2nd day of February 1973, in the Southern District of New York, RUBEN FELICIANO and BENIGNO RAMIREZ, unlawfully, wilfully, knowingly and corruptly did directly and indirectly give, offer and promise a thing of value, to wit, money in the sum of \$1,000, to a public official of the United States, to wit, Joseph F. McGrath, a Revenue Agent, Internal Revenue Service, United States Treasury Department, with intent to influence his official acts, to wit, the audit of the 1969 and 1970 federal income tax returns of BENIGNO RAMIREZ.

(Title 18, United States Code, Section 201(b) and 2)

SECOND COUNT

The Grand Jury further charges:

On or about the 2nd day of February 1973, in the Southern District of New York, RUBEN FELICIANO and BENIGNO RAMIREZ, unlawfully, wilfully and knowingly did directly and indirectly give, offer and promise a thing of value, to wit, money in the sum of \$1,000, otherwise than as provided by law for the proper discharge of official duties to a public official of the United States,

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73-1127

to wit, Joseph F. McGrath, a Revenue Agent, Internal Revenue Service, United States Treasury Department, for and because of official acts performed and to be performed by said public official, to wit, the audit of the 1969 and 1970 federal income tax returns of BENIGNO RAMIREZ.

(Title 18, United States Code, Section 201(f) and 2)

Annie Hewitt
FOREMAN

Whitney North Seymour, Jr.
WHITNEY NORTH SEYMOUR, JR.
United States Attorney



United States District Court

SOUTHERN DISTRICT OF NEW YORK

THE UNITED STATES OF AMERICA

vs.

RUBEN FELICIANO and
BENIGNO RAMIREZ,

Defendants.

INDICTMENT

73 Cr.

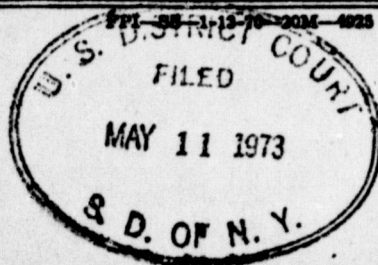
(18 USC §§ 2, 201(b), 201(f))

WHITNEY NORTH SEYMOUR, JR.

United States Attorney.

A TRUE BILL

Foreman.



May 11, 1973 - B/W ordered.

MAY 29 1973

Feliciano present with atty.

Court enters plea of N/G - R.O.R. Ten days for motions.

Ramirez present with atty. N/G
R.O.R. Ten days for motions.

JAN 21 1974

Deft. Ramirez (interpreter Maria Elena Cardenas) with attorney Frank Ortiz present with deans plea of not guilty and pleads guilty to Ct. 1. P.S. D. ordered. Sentence date 3/5/74 at 9:45 A.M. R.O.R.

JAN 21 1974

Deft. Feliciano with atty Larry Greenberg present. Jury trial begins.

JAN 22 1974

Trial continues.

JAN 23 1974

Trial concluded. Jury deliberates. Sentence ordered. Verdict - Guilty as charged. Sentence date 3/5/74. R.O.R. Inform U.S. atty's office if leaving area - Ward, J. WM

④

C. W.

CHARGE OF THE COURT

THE COURT: It is the custom in our court that the juror seated in seat No. 1 will serve as the foreman of the jury. That is Mr. Maddox. Mr. Maddox will tally the vote and will be the one through whom any message which you wish to send out will be transmitted. Those messages should be written on paper which will be supplied to you. If you should require anything during the course of your deliberations, you will write your requirements on that paper. You will send the paper out to me and within the proper limits I shall try to oblige you as promptly as possible.

Finally when the jury comes out it will be the job of the foreman, in response to questions from our clerk, Miss Kruger, to indicate your verdict. You will be deliberating on two counts of an indictment and you will vote separately on each count. You will vote guilty or not guilty on count one, guilty or not guilty on count 2, and when the questions are asked of your foreman, the foreman will report the jury's verdict.

Mr. Foreman, ladies and gentlemen of the jury: Now that the testimony is over and the arguments are completed, the time has come for you and me to do our part in the administration of justice in this case. It is my province to instruct you as to the law and you must accept my

instructions on that.

That, of course, accords with what you committed yourselves to when you were selected. And it accords with your oath as jurors.

It is your function to determine the facts. Your decision on the facts is final and conclusive.

In considering the evidence and determining the facts in this case, you must lay aside any considerations of sympathy. It is your duty as well as mine to administer justice fairly and impartially. In doing so we must be guided solely by the law and the evidence and neither I nor you can permit our conclusions to be affected by sympathy.

Before I turn to the indictment with which we are concerned here, there are a few general observations that I want to make.

It is your recollection of the facts that governs. You have heard two very good closing arguments. Each counsel has given to you his recollection of the facts. Should your recollection differ from that of the lawyers or from mine, please disregard anything that we have said as far as the facts are concerned.

If you want to have any testimony of any witness read back to you, that will be done at your request.

If you want to see any of the exhibits which are

1 in evidence, they will be sent to the jury room at your
2 request.
3

4 Of course, you will consider only the facts
5 which have been developed at this trial. You are not to be
6 influenced by anything that you may have read about criminal
7 cases or anything that you may have heard about them on the
8 radio or seen on television. It is only what you have heard
9 here and seen here that counts.

10 At times during this trial I have been called
11 upon to make rulings on various matters of law. I have
12 sustained objections and I have overruled objections. Please
13 do not concern yourselves at all with my reasons for doing
14 this. Those were purely legal matters.

15 From time to time conferences were conducted at
16 the side bar at the request of the attorneys. These con-
17 ferences were solely on questions of law and are of no
18 concern to you. You are not to draw any inferences against
19 either side because of requests for such conferences.

20 If during the trial I have said anything or
21 indicated anything in which questions to witnesses leads you
22 to believe that I am inclined to favor one side or the other,
23 please disregard it. It is not my intention to favor one
24 side or the other. Any questions which I asked were asked
25 purely for clarification.

1
2 You have heard the explanations of counsel. If
3 you believe that any counsel stated as a fact something as
4 to which there is no evidence, please disregard that part of
5 what was said. Statements of counsel, openings, closings,
6 explanations that is, statements which may have been made in
7 your presence during the course of the trial, are not
8 evidence, nor are questions evidence. The evidence is the
9 answers of the witnesses, the testimony that they gave, and
10 the exhibits which were received in evidence. It is your
11 function to look at the evidence and it is solely up to you
12 to determine what evidence you believe.

13 You have heard the testimony. How do you deter-
14 mine what weight you would give to it? How do you determine
15 whether you are going to believe it or not? Or believe part
16 of it or not believe part of it?

17 In this, just use your plain every day common
18 sense. You saw the witnesses. You heard them. How did
19 their testimony impress you? Did they appear to be testify-
20 ing frankly, honestly? In evaluating their testimony and
21 their credibility, you apply your own good sense and
22 experience just as you would do in determining an important
23 matter in your own lives when you decide whether or not you
24 have been given a true picture of a certain situation.

25 You may consider a witness' demeanor on the stand,

his candor, his openness or lack, his ability to **express** himself, his possible bias, his possible hostility, his strength of recollection, his accuracy of recollection. It is up to you to weigh the testimony of the witnesses.

A defendant has the absolute right not to testify and you must not draw a presumption of **guilt** or any inference against the defendant because he did not testify.

Going further, if you find that any witness has made a material statement with the intention of misleading you, you may disregard that part of the witness' testimony or you may disregard it all if you do not believe it, or you may accept the part which you believe and find to be reliable and disregard the rest.

All of these things you consider in judging credibility and determining where the truth lies. That is your function as the triers of the fact, to determine where the truth lies.

You may hear me sometimes refer to direct evidence and to circumstantial evidence. It is well to explain now the difference between these two types of evidence.

Direct evidence is where a witness testified to what he saw, heard, or observed, what he knows of his own knowledge, something which comes to him by virtue of his

senses.

Circumstantial evidence is evidence of facts and circumstances from which one may infer connected facts which reasonably follow in the common experience of mankind. Stated somewhat differently, circumstantial evidence is that evidence which tends to prove a disputed fact by proof of other facts which have a logical tendency to lead the mind to a conclusion that those facts exist which are sought to be established.

Circumstantial evidence, if believed, is of no less value than direct evidence, for in either case you must be convinced beyond a reasonable doubt of the guilt of a defendant.

Let's take a simple example, one which is often used in this courthouse to illustrate what is meant by circumstantial evidence.

When you entered the courthouse this morning the sun was shining brightly outside. It was a clear day. There was no rain. The sky was clear. Now assume that in this courtroom the blinds and the drapes are drawn so that you cannot look outside. Assume you are sitting in your jury box and, despite the fact that it was sunny and dry when you entered the building, somebody walks in the door with an umbrella dripping water followed in a short time by someone

1 else wearing a raincoat. You note by observation that the
2 raincoat is all wet. Now, on our assumption: you cannot
3 look out of the courtroom and see directly whether it is
4 raining or not, if you are asked, is it raining, you cannot
5 say that you know it directly from your own observation, but
6 certainly upon the combination of facts as given, even though
7 when you entered the building it was sunny and was not
8 raining outside, it would be reasonable and logical for you
9 to conclude that it is raining now.
10

11 That is about all there is to circumstantial
12 evidence. You infer on the basis of reason and experience
13 from an established fact the existence of some further fact.
14 There are times when different inferences may be drawn from
15 facts, whether they are proved by direct or circumstantial
16 evidence. The Government asks you to draw one set of
17 inferences while the defendant asks you to draw another. It
18 is for you to decide, for you alone, what inferences you
19 will draw.

20 In considering the evidence it is the quality of
21 the evidence that counts, not the number of witnesses or the
22 number of exhibits. You will weigh the evidence, you will
23 weigh the quality of the evidence, not the quantity.

24 The fact that this presentation is brought by
25 the United States does not entitle the Government to greater

consideration than any other litigant would get, and by the same token it is entitled to no less consideration. All parties, the Government and individuals, stand as equals in this court.

In a moment I will briefly discuss with you the indictment in this case and the issues presented for your consideration. Before doing so I want to repeat what I told you in my preliminary remarks on Monday morning when you were impaneled, that the indictment itself is not evidence. It merely describes the charge against the defendant. The Government, having made the charge, has the burden of proving it and, as I have said now on several occasions, has the burden of proving it beyond a reasonable doubt. This burden never shifts. It remains with the Government during the entire trial. As I have indicated to you, and I say it again, a defendant does not have to prove his innocence. He is presumed to be innocent. This presumption of innocence is overcome only if you reach a conclusion from the evidence that his guilt has been established to your satisfaction beyond a reasonable doubt.

Now let's talk about that term which I have mentioned to you several times. What is meant by reasonable doubt? There is nothing mysterious about this term. As the words themselves indicate, it means a doubt based on reason

1 which arises from the evidence or the lack of evidence. It
2 does not mean a capricious or silly doubt which might arise
3 because of sympathy. It is such a doubt as would cause
4 prudent men and women to hesitate before acting in matters
5 of importance to themselves. Proof in such cases or proof
6 in cases such as this, I should say, is not a matter of
7 mathematical certainty. You cannot use a slide rule, and
8 even in this day and age there is no way we can computerize
9 justice. In the nature of things it cannot be. But to
10 sustain a conviction there must be such evidence as satisfies
11 your reason as intelligent human beings beyond a reasonable
12 doubt that the defendant is guilty.

14 The indictment in this case contains two counts.
15 Each count charges a separate crime. They must each be
16 considered separately.

17 Count 1 charges that on or about February 2,
18 1973, the defendant directly and indirectly gave, offered and
19 promised a public official \$1,000 with intent to induce an
20 act in violation of the public official's lawful duty. In
21 simple language, count 1 charges that the defendant gave
22 Agent McGrath \$1,000 with the specific intent to influence
23 him in the audit of the 1969 and 1970 Federal tax returns of
24 Benigno Ramirez.

25 Count 2 charges that the defendant, on or about

1 pgrm

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2 February 2, 1973, directly and indirectly gave, offered
3 and promised a public official \$1000 otherwise than as
4 provided by law for the proper discharge of official duties
5 for and because of official acts performed and to be
6 performed by said public official.

7 Cutting through the legalese, in simple
8 language, count 2 charges that the defendant paid Agent
9 McGrath \$1000 for the performance of official acts.

10 The defendant is charged with having violated
11 certain federal statutes, specifically, Title 18 of the
12 U. S. Code, Sections 201-B and 201-F, and Section 2 of
13 Title 18 of the U. S. Code which provides in pertinent
14 part, "Whoever directly or indirectly corruptly gives,
15 offers or promises anything of value to any public
16 official with intent one, to influence any
17 official act or, two, to influence such public official
18 to commit or aid in committing, or allow any fraud
19 or make opportunity for the commission of any fraud on
20 the United States, or, three, to induce such public
21 official to commit any act in violation of his
22 lawful duty," commits a crime.

23 The law further provides, and I quote, "Whoever
24 otherwise than as provided by law for the proper discharge of
25

(Continued on next page)

official duty directly or indirectly gives, offers or promises anything of value to any public official" -- skipping a few words now -- "for or because of any official act performed or to be performed by such public official..." commits a crime.

And finally, the last of the sections, Section 2 of Title 18 provides, "Whoever commits an offense against the United States or aids and abets, counsels, commands, induces or procures its commission is punishable as a principal.

I shall now read the indictment. You will note in my reading of the indictment a reference to Benigno Ramirez. I charge you that Benigno Ramirez is not on trial before you. You should not draw any inferences or conclusions from that fact. You should disregard the fact of Benigno Ramirez' name being mentioned in the indictment and should not consider it in any way in connection with your deliberations as to the guilt of Ruben Feliciano, the defendant on trial before you.

The indictment reads as follows:

"The grand jury charges: On or about the 2nd day of February, 1973, in the Southern District of New York, Ruben Feliciano and Benigno Ramirez unlawfully, willfully, knowingly and corruptly did directly and indirectly give, offer and promise a thing of value, to wit, money in the sum

1 of \$1,000 to a public official of the United States, to wit,
2 Joseph F. McGrath, a Revenue Agent, Internal Revenue Service,
3 United States Treasury Department, with intent to influence
4 his official acts, to wit, the audit of the 1969 and 1970
5 Federal income tax returns of Benigno Ramirez. Title 18,
6 U. S. Code, Section 201B and 2."
7

8 Second count: "The grand jury further charges:

9 On or about the 2nd day of February 1973 in the Southern
10 District of New York, Ruben Feliciano and Benigno Ramirez
11 unlawfully, willfully and knowingly did, directly and
12 indirectly, give, offer and promise a thing of value, to wit,
13 money in the sum of \$1,000 otherwise than as provided by law
14 for the proper discharge of official duties to a public
15 official of the United States, to wit, Joseph F. McGrath, a
16 Revenue Agent, Internal Revenue Service, United States
17 Treasury Department, for and because of official acts per-
18 formed and to be performed by said public official, to wit,
19 the audit of the 1969 and 1970 Federal income tax returns of
20 Benigno Ramirez. Title 18, U. S. Code, Section 201F and
21 Section 2."

22 In order to find the defendant guilty of the
23 crime of bribery as charged in the first count of the indict-
24 ment, you must find beyond a reasonable doubt first that the
25 defendant on or about the 2nd day of February, 1973, and I

1 believe the proof relates to February 1, 1973, willfully and
2 knowingly gave \$1,000 to Revenue Agent Joseph F. McGrath who
3 was then an employee of the Internal Revenue Service,
4 United States Treasury Department.

5
6 Second, that the defendant paid \$1,000 to Revenue
7 Agent McGrath with the intent to influence McGrath's audit
8 examination of the 1969 and 1970 Federal tax returns of
9 Benigno Ramirez.

10 In other words, in order to find the defendant
11 guilty of the crime of bribery as charged in the indictment,
12 you must find that Revenue Agent McGrath was a Government
13 employee acting in an official capacity, and further that
14 the defendant paid the \$1,000 with the intent to influence
15 McGrath's audit examination of the 1969 and 1970 Federal
16 tax returns of Ramirez.

17 In order to find the defendant guilty of the
18 crime of bribery, it is not necessary for you to find that
19 the Revenue Agent was, in fact, influenced. All that is
20 required is that it was the intention of the defendant, in
21 paying the bribe, to influence Revenue Agent McGrath. In
22 other words, the defendant can properly be found guilty of
23 the crime of bribery regardless of what Revenue Agent McGrath
24 was thinking or planning.

25 Or phrased somewhat differently, it is not

necessary that the bribe was successful or that Revenue Agent McGrath was, in fact, influenced. All that is necessary is that the defendant paid the money with the intent to influence Revenue Agent McGrath in the conduct of his work.

In order to find the defendant guilty of giving an unlawful gratuity as charged in count 2 of the indictment, you must find beyond a reasonable doubt first that on or about February 2, 1973, as I have said the proof indicates the events we are talking about occurred on February 1, 1973, the defendant willfully and knowingly gave \$1,000 to Revenue Agent McGrath, who was then an employee of the Internal Revenue Service, United States Treasury Department.

Second, that the defendant gave the \$1,000 for or because of official acts performed or to be performed by Revenue Agent McGrath, to wit, the audit examination of the 1969 and 1970 Federal tax returns of Benigno Ramirez.

Third, that the \$1,000 was paid otherwise than as provided by law for the proper discharge of official duties.

In order to find the defendant guilty of giving an unlawful fee or gratuity, it is not necessary that you find that the defendant paid the \$1,000 with the intent to influence Revenue Agent McGrath or that there was any corrupt intent at all.

1 Congress, in order to maintain the integrity of
2 the Federal Civil Service, has forbidden and declared as
3 criminal the giving to a Federal employee any money other-
4 wise than as provided by law for the proper discharge of
5 official duties as a gratuity or as a favor when that money
6 is given for and because of any official act performed by
7 that employee. Therefore, with respect to the charge of
8 giving an unlawful fee or gratuity, that is count 2, the
9 Government is required to prove only that the defendant paid
10 the money willfully and knowingly, that is intentionally,
11 as distinguished from inadvertently or negligently. And that
12 such monies were not required by law to be given but were
13 given for or because of the performance of the alleged
14 official acts.
15

16 I charge you as a matter of law that no money is
17 authorized by law to be received from any source other than
18 the Government for the performance of duties as an Internal
19 Revenue Agent as Agent McGrath allegedly received here.

20 I charge you further as a matter of law that an
21 employee of the Internal Revenue Service, United States
22 Treasury Department, such as Agent McGrath, is an employee of
23 the United States within the meaning of the statute charged
24 to be violated in this indictment.

25 I further instruct you as a matter of law that

the auditing of Federal income tax returns of taxpayers is one of the official duties of Internal Revenue Service agents.

In order to convict the defendant, you must find beyond a reasonable doubt that the defendant committed the alleged offense "unlawfully, willfully, and knowingly".

What do these terms "unlawfully, willfully and knowingly" mean?

An act is done knowingly if it is done voluntarily and purposely and not because of mistake, accident, emergency or other innocent reason.

An act is willful if it is done knowingly and deliberately and with an evil motive or purpose.

Unlawful means contrary to law.

Hence, to do an act unlawfully means to do something which is contrary to law.

In determining whether a defendant has acted knowingly and willfully, it is not necessary for the Government to establish that the defendant knew that he was breaking any particular law or any particular rule.

Knowledge and intent exists in the mind. Since it is not possible to look into a man's mind to see what went on, the only way you have for arriving at a decision on this question is for you to take into consideration all the facts and circumstances shown by the evidence including the

exhibits and to determine from all such facts and circumstances whether the requisite knowledge and intent were present at the time in question. Direct proof is unnecessary.

Knowledge and intent may be inferred by all the surrounding circumstances, what I described before as circumstantial evidence.

As far as intent is presumed, you are instructed that a person is presumed to intend the natural and probable or ordinary consequences of his acts.

In this case we are not concerned with the correct amount of tax that was or was not to be assessed against Benigno Ramirez. Although at times it may have seemed as though we were trying an income tax case, we were not trying one. The only matter concerning taxes that you should concern yourselves with at all is whether or not a particular agent in this case, Agent McGrath, in his official capacity, was making an audit of the tax return in order to determine whether or not taxes were due and owing from Benigno Ramirez to the United States, and whether, if you believe it to be a fact, the offer to bribe or the bribe itself was made to influence an agent's decision in that matter. It is completely immaterial if the agent was correct or not correct in his conclusions as to the existence of tax deficiencies in the Federal income tax returns of Mr.

1
2 Ramirez. Of course, the gravamen, the essence, of the crime
3 is the giving or offering of a bribe to a person acting on
4 behalf of the United States for the purpose of influencing
5 his official conduct. Obviously no one would give or offer
6 a bribe unless he expected to gain some advantage thereby
7 for himself or for another.

8 The defendant argues the defense of entrapment.
9 The word "entrapment" is a legal term. It has a technical
10 meaning which is different from that of popular speech or
11 ordinary usage, therefore, I will explain the word and the
12 meaning of entrapment as it is used in the law.

13 The defense of entrapment is based upon a policy
14 that law enforcement agencies cannot manufacture crime. They
15 cannot lead innocent people into committing a crime simply in
16 order to prosecute them. / But a line must be drawn between
17 the entrapment of the unwary innocent and the trap for the
18 unwary criminal. //

19 The function of law enforcement is not only the
20 prevention of crime but also the detection and apprehension
21 of criminals. Such detection and apprehension take various
22 forms. For example, law enforcement agencies often use
23 investigators such as Revenue Agent McGrath and use tape
24 recordings such as those you heard as evidence in attempting
25 to enforce the law.

In addition such agencies must often instruct individuals, such as Mr. McGrath, to participate in crime. Stealth and strategy are often necessary weapons in the detection and prosecution of crime. Whether or not you personally agree with the policy of using such methods, indeed whether or not I personally agree with the policy of using such methods, is not an issue to be considered here. Were it not for the use of such methods many crimes would go undetected and unprosecuted.

Certain crimes have a common feature which requires the use of such means of detection. These are the crimes that are committed privately with a willing victim, such as the recipient of a bribe who will not complain, thus making normal detection virtually impossible.

The question of entrapment involves two issues and should be considered by you in two stages. It is important that you realize this during your deliberations.

The first issue for you to consider, which you heard argued by counsel, is whether the defendant was induced to commit the crime by anyone acting for the Government, in this case by Agent McGrath. It is an essential feature of the defense of entrapment that the idea or design of committing the crime originate with a law enforcement officer rather than with a defendant. So the first question you must

ask is: Who initiated the criminal transaction involved in this case? Did McGrath initiate the criminal transaction in this case? Did he propose or suggest it? Or did Mr. Feliciano initiate the criminal transaction involved in this case? Did he propose or suggest it?

I instruct you that the defendant must adduce some evidence that McGrath initiated the illegal conduct and thereby himself induced the defendant to commit the offense.

In short, it is necessary for the defendant to have adduced some evidence that McGrath took the first step to set in motion the criminal activity charged in the indictment. If you do not find such inducement there can be no entrapment.

If you are satisfied by the Government's proof as to the lack of inducement, then there can be no entrapment as a matter of law.

If, however, you are satisfied from a review of the record that the defendant has produced some evidence that the Government initiated the criminal transaction, then you must consider the second issue, that is, did the Government prove beyond a reasonable doubt that the inducement was not the cause of the crime, but rather that the defendant was ready and willing to commit the crime?

You must pass upon this second question because

1 the defense of entrapment is not simply that the Government
2 initiated the criminal transaction. You will recall that I
3 explained that the defense of entrapment is based on the
4 policy that law enforcement agencies cannot manufacture
5 crime by leading innocent people into committing a crime.
6 This policy creates a distinction between the unwary innocent
7 and the unwary criminal.
8

9 Accordingly, even if you do find, pursuant to my
10 instructions, that Agent McGrath initiated the criminal
11 transactions charged in the indictment, there can neverthe-
12 less be no entrapment if the defendant was, in fact, an
13 unwary criminal as distinguished from an unwary innocent.
14 That is, when I say unwary criminal, that is one who was
15 ready and willing to seize upon the opportunity afforded by
16 the Government to commit the crime.

17 Thus, if a person has a readiness and willingness
18 to break the law, the mere fact that a Government agent
19 provides a favorable opportunity for the commission of a
20 crime is no defense. In such a case the Government has
21 certainly not led an innocent person astray but has only
22 provided the means by which the defendant may realize his
23 already pre-existing purpose. In such a situation the
24 inducement by the Government which brought about the actual
25 offense does no more than provide the defendant with what

appears to be a favorable or timely or convenient time, place, opening or opportunity for the criminal conduct in which this defendant was willing to engage.

There are several ways the Government can show that the defendant was ready and willing. "One of these is that the defendant had an already-formed design to commit the crime for which he is charged in this case.

Another way is for the Government to show the defendant's willingness to commit the crime with which he is charged and this can be evidenced by his ready response to the inducement.

You may consider both these ways as far as they bear on the defendant's being ready and willing to commit the crimes charged in the indictment.

There has been testimony, there has been some comment, that the defendant Ruben Feliciano made statements tending to show his innocence at the time of his arrest. Agent Solar testified that when he arrested the defendant at Graham Avenue in Brooklyn, he advised him of his rights. He even asked him whether he had had an audit with Agent McGrath and the answer was, "Yes." He asked him if he or Mr. Ramirez had given Agent McGrath any money. The answer was, "No."

He asked him if Agent McGrath had asked for any money. According to Agent Solar, the answer was, "No."

1
2 Agent Solar then testified that the defendant
3 was interviewed by Assistant United States Attorney Trubner
4 and was advised of his rights. At that interview, according
5 to Agent Solar, Mr. Feliciano said he had paid no money,
6 that he saw Agent McGrath receive no money. Mr. Feliciano
7 admitted that he had had an appointment with Mr. McGrath and
8 said the reason for the appointment was so Mr. McGrath
9 could see two witnesses.

10 I mentioned a portion of the testimony. I urge
11 you in your consideration of the case to examine and review
12 each and every portion of the testimony both on direct
13 examination and cross examination and urge you to consider
14 each and every one of the exhibits which are in evidence.

15 As I have indicated, there has been some testi-
16 mony that the defendant Feliciano made statements tending to
17 show his innocence at the time of his arrest. There has also
18 been some testimony presented that these statements were
19 false. I charge you that exculpatory statements, when shown
20 to be false, are circumstantial evidence of consciousness of
21 guilt and have independent probative force.

22 The evidence shows that when Revenue Agent McGrath
23 met the defendant and spoke to him on the telephone on
24 various occasions in January and February of 1973, he was
25 equipped with certain recording and transmitting devices.

1 pgm
2 Just in case you may have some doubt on this subject, I am
3 instructing you that the use of these devices in the manner
4 described in this case is entirely within the law and
5 violates no one's rights. This is so essentially because
6 Revenue Agent McGrath, who was a participant in the conver-
7 sations, consented to have them recorded. Accordingly, the
8 use of these devices was a proper investigative technique.

9 I will conclude with these remarks:

10 Under your oath as jurors you may not allow the
11 consideration of sentence which might be inflicted upon
12 a convicted defendant to influence your verdict in any way
13 or in any sense enter into your deliberations. The duty of
14 imposing sentence in the event of conviction rests
15 exclusively on the Court. Your function is solely to
16 determine the guilt or innocence of the defendant upon the
17 basis of the testimony. If you believe that the testimony
18 shows beyond a reasonable doubt that the defendant is guilty
19 of the charges made in the indictment, you will find the
20 defendant guilty.

21 If you find that the charges have not been proved
22 beyond a reasonable doubt or that the evidence respecting
23 the defendant is as consistent with innocence as with guilt,
24 the defendant should be acquitted.

25 But, on the other hand, if you find that the law

has been violated, you should not hesitate or fail because of sympathy or for any other reason to render a verdict of guilty.

There are 12 people on this jury. Any verdict must be the unanimous verdict of all of you. I will point out, however, that no one should enter upon the deliberations in the jury room with such pride of opinion that he or she would refuse to change it if convinced by intelligent argument on the part of another juror or jurors that they are right. However, you are not to do violence to your own well-founded opinion and common sense. You take your good common sense into the jury room. I trust you will use it while you are in the jury room and that when you come out of the jury room having completed your deliberations, your good common sense will accompany you.

I expect, too, that when you come out of the jury room your good common sense will accompany you.

You are entitled to your opinion; in other words, each of you must decide the case for himself or herself after thoroughly reviewing the evidence and exchanging views with your fellow jurors.

I have concluded my charge. At this point I would ask the two alternate jurors to go into the jury room and get their coats and then to return to the jury box.



I certify a copy
was served by mail
on 8/19/74 on the
USA - SDNY
By the
Law

